UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WPIX, INC., WNET.ORG, AMERICAN BROADCASTING COMPANIES, INC., DISNEY ENTERPRISES, INC., CBS BROADCASTING INC., CBS STUDIOS INC., THE CW TELEVISION STATIONS INC., NBC UNIVERSAL, INC., NBC STUDIOS, INC., UNIVERSAL NETWORK TELEVISION, LLC, TELEMUNDO NETOWRK GROUP LLC, NBC TELEMUNDO LICENSE COMPANY, OFFICE OF THE COMMISSIONER OF BASEBALL, MLB ADVANCED MEDIA, L.P., COX MEDIA GROUP, INC., FISHER BROADCASTING-SEATTLE TV, L.L.C., TWENTIETH CENTURY FOX FILM CORPORATION, FOX TELEVISION STATIONS, INC., TRIBUNE TELEVISION HOLDINGS, INC., TRIBUNE TELEVISION NORTHWEST, INC., UNIVISION TELEVISION GROUP, INC., THE UNIVISION NETWORK LIMITED PARTNERSHIP, TELEFUTURA NETWORK, WGBH EDUCATIONAL FOUNDATION, THIRTEEN, and PUBLIC BROADCASTING SERVICE,

Plaintiffs,

- against -

IVI, INC. and TODD WEAVER,

Defendants.

Docket No.: 10 Civ. 7415 (NRB)

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF CROSS-MOTION TO TRANSFER AND/OR TO DISMISS FOR LACK OF PERSONAL JURISDICTION

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PRELIMINARY STATEMENT

Defendants ivi, Inc. and Todd Weaver move to transfer this action to the Western District of Washington where an overlapping action was previously filed by ivi, Inc. (ivi, Inc. uses a lower-case "i" in its name, and will be referred to as "ivi" throughout this memorandum). In the alternative, Weaver moves to dismiss for lack of personal jurisdiction.

The Plaintiffs in this action have accused ivi of infringing copyrights by making secondary transmissions of television programming over the Internet. Before this action was filed, ivi had already filed an action seeking a declaratory judgment of noninfringement in the Western District of Washington, but in an effort to shop for a preferred forum the Plaintiffs filed this redundant action here. In addition to giving ivi the benefit of its initial forum selection, the relevant factors weigh heavily in favor of the transfer of this action to the Western District of Washington.

I. CASE BACKGROUND

ivi is an entity that receives over-the-air broadcasts of television content that originates with others. ivi then makes the original content from the primary transmissions available to consumers who download the ivi TV player. The ivi TV player allows consumers to receive the television content over the Internet in the same way that cable or satellite television consumers are able to play the identical content using a set top box or similar player. *See* Declaration of Todd Weaver, at ¶ 2.

ivi began providing its secondary transmissions of such television content to consumers on September 13, 2010. Weaver Dec., at ¶ 3. ivi's service promptly drew the attention of television stations and media companies, including the Plaintiffs in this action, who demanded that ivi immediately cease and desist its television services. The cease and desist letters focused on the alleged transmission of television content originating with Seattle-based television stations, making it clear that Seattle was the center of the dispute. Indeed, the first letter from Fisher Communications expressly mentioned Seattle television station KOMO-TV and did not mention New York at all. The Fisher Communications letter also made no settlement overture and provided no timetable or deadline other than demanding that ivi stop "immediately." The messages in the other letters were similarly unmistakable: unless ivi stopped then litigation would follow, apparently in Seattle. Weaver Dec., at ¶¶ 4-6.

A week after receiving its first cease and desist letter, ivi filed a complaint in the Western District of Washington seeking a declaratory judgment that its business did not infringe any copyrights owned by any of the companies that had accused it of copyright infringement. That action is Case No. 2:10-cv-0512-JLR; *see* Weaver Dec., at ¶ 7.

More than a week after ivi filed its complaint in Seattle, the Plaintiffs filed the underlying action in this Court. They have also filed a motion in Seattle seeking the dismissal of ivi's first-filed action so that this case may proceed instead. The action of the Plaintiffs--primarily large media companies who do business across the country and are fully capable of litigating anywhere--is plainly intended to control the forum and force ivi to litigate in a distant forum. Moreover, the Plaintiffs have inexplicably named ivi's CEO Todd Weaver as a defendant in this action even though there is no good faith basis (and no allegation of facts) supporting jurisdiction over him here.

Under the circumstances, this action should be transferred to the Western District of Washington in deference to ivi's first-filed complaint that is pending in that forum. In addition, the other relevant factors demonstrate that transfer would benefit the parties and the witnesses and would be in the interest of justice. In the event it is not transferred, Weaver should be dismissed for lack of personal jurisdiction over him.

II. THIS ACTION SHOULD BE TRANSFERRED

A district court may transfer any civil action for "the convenience of the parties and witnesses, in the interest of justice . . . to any other district or division where it may have been brought." 28 U.S.C. § 1404. Section 1404 seeks to prevent the waste of time, energy, and money, and to protect litigants, witnesses and the public against unnecessary inconvenience and expense.

As applied to this case, it further seeks to avoid duplicative litigation and to respect the jurisdiction of the first-filed action by transferring the action to the forum where a redundant case is already pending which involves the same subject matter and most of the same parties.

"A court performs a two-part inquiry to determine whether transfer is appropriate. First, the court must determine whether the action sought to be transferred is one that 'might have been brought' in the transferee court." *In re Collins & Aikman Corp. Sec. Litig.*, 438 F. Supp. 2d 392, 394 (S.D.N.Y. 2006). Second, "the court must evaluate whether transfer is warranted using several factors relating to the convenience of transfer and the interests of justice." *Id.* As the party requesting the transfer, ivi and Weaver bear the burden of making the case in favor of the transfer. *New York Marine & Gen. Ins. Co.*, 599 F.3d 102, 114 (2d Cir. 2010). As noted below, however, ivi's initial selection of the Western District of Washington as the forum for the present dispute should not be disturbed absent compelling reasons to the contrary.

A. This action could have been brought in Seattle

This action could readily have been brought in Seattle. ivi has a principal place of business in Seattle and Weaver resides in Seattle. Weaver Dec., at ¶ ¶ 2 and 8. Both of them are subject to jurisdiction in Seattle, including in the Western District of Washington. As explained below, however, this Court lacks jurisdiction over Weaver individually and therefore this action cannot be maintained in this Court without dismissing Weaver.

B. The other relevant factors weigh heavily in favor of transfer

Among the factors to be considered in determining whether to grant a motion to transfer venue are (1) the plaintiff's choice of forum, (2) the convenience of witnesses, (3) the location of relevant documents and relative ease of access to sources of proof, (4) the convenience of parties, (5) the locus of operative facts, (6) the availability of process to compel the attendance of unwilling witnesses, and (7) the relative means of the parties. *New York Marine*, 599 F.3d at 112. In this case, these factors weigh heavily in favor of transfer to Seattle.

1. The choice of forum

As the *New York Marine* court observed, the plaintiff's choice of forum should not be disturbed unless the balance in favor of transfer is shown by clear and convincing evidence. *Id*. That analysis is altered where, as here, the moving party was the first to file an identical action in a different forum and seeks to transfer the present action to that forum. In such a case, the moving party is the first to file and that choice should not be disturbed without good cause. As the Second Circuit has previously held, "[W]here there are two competing lawsuits, the first suit should have priority, absent the showing of balance of convenience or special circumstances giving priority to the second." *First City Nat'l Bank & Trust v. Simmons*, 878 F.2d 76, 79 (2d Cir. 1989) (internal quotations, citation, and alterations omitted); *see also D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 106 (2d Cir. 2006).

The Plaintiffs have asserted in the complaint and in their pending motion to dismiss that the first-filed action in Seattle was "anticipatory" in view of settlement discussions raised in letters from some of the Plaintiffs to ivi. But there were neither settlement discussions nor invitations to engage in settlement discussions. Each of the letters to ivi were straightforward accusations of infringement that pointed to specific statutes and demanded that ivi stop all further activities deemed to be infringing. The very first letter sent to ivi, from Fisher Communications, simply demanded that ivi "immediately cease and desist from retransmitting the Station's signals by all means and to all persons." Weaver Dec., at ¶ 4. There was no deadline other than "immediately" and no invitation to settle. The other letters similarly accused ivi of infringement with no settlement offers or invitations. *Id*. Accordingly, the first-filed rule should be followed. *See D.H. Blair*, 462 F.3d at 106 (following the first-filed rule, noting that there was little or no evidence of settlement discussions).

The mere fact that a complaint is one seeking declaratory judgment also does not make it anticipatory or otherwise improper in a way that prevents application of the first-filed rule. *Ontel Prods. v. Project Strategies Corp*., 899 F.Supp. 1144, 1150 (S.D.N.Y. 1995). Rather, a filing may be anticipatory or improper "where it attempts to exploit the first-filed rule by securing a venue that differs from the one that the filer's adversary would be expected to choose." *Id*. In this case, ivi had every reason to believe that any lawsuit would be filed by the Plaintiffs in Seattle and therefore ivi did not file an anticipatory action seeking to gain a more favorable forum.

ivi received a first letter from Fisher Communications on September 14 accusing ivi of retransmitting content from a Seattle TV station referred to as "Fisher's Television Station KOMO-TV." Weaver Dec., at ¶ 4. The Fisher letter expressly referred to Seattle, did not mention New York at all, and explained that Fisher had not granted authorization relating to content originating with its affiliates in Seattle. *Id*. Surely any action filed by Fisher would have been expected to be filed in Seattle.

ivi received a second letter from additional parties including ABC, CBS, The CW, Disney, Fox, major League Baseball, Fox, WGBH, and WNET.ORG. Weaver Dec., at ¶ 5. This second letter mentioned both New York and Seattle but focused on Seattle. Thus, it asserted that ivi had been providing "the signals of several Seattle and other broadcast stations…" While some of the parties named in the second letter are headquartered in New York, others are not: Disney is in California, Fox is in California, and WNET.ORG is in Massachusetts. This second letter was also sent by attorneys located in Washington D.C., making New York appear to be even less likely forum. Based on this second letter, ivi again expected any litigation to be filed in Seattle.

Finally, NBC Universal sent a third letter from NBC Universal that made similar accusations. This third letter did not mention any particular local TV stations in either Seattle or New York, providing little basis to expect a complaint to be filed in either location over the other. Weaver Dec., at ¶ 6. The totality of the correspondence, however, pointed heavily toward Seattle, and because ivi is located in Seattle any lawsuit would presumably have been filed there. It would be erroneous to conclude that ivi filed an action in Seattle as an improper means to choose a forum and exploit the first-filed rule.

ivi further observes that the court in which the first-filed case was brought should be the one to decide the question of whether to apply the first-filed rule. *Ontel Prods*., 899 F.Supp. at 1150 n. 9. The defendants in the co-pending action in Seattle have filed a motion seeking to dismiss that action in favor of this one. *See* Case No. 2:10-cv-0512-JLR, at Court Doc. 5. The analysis of that motion will necessarily involve the identical factors at issue here, including an evaluation of the first-filed rule. In accordance with this Court's precedence, this Court should defer resolution of the issue (and likewise any other evaluation of the merits, including the Plaintiffs' pending motion for a preliminary injunction) until after the Western District of Washington has ruled on its pending motion to dismiss. In the event the Western District of Washington retains jurisdiction, thereby affording ivi the benefit of the first-filed rule, this Court should likewise give ivi the benefit of the first-filed rule and transfer this action to Seattle.

2. The convenience of the witnesses and location of evidence

The next factor to consider is the convenience of the witnesses and location of evidence. There likely will be few, if any, third party witnesses in this action. The claims involve allegations of copyright infringement and all of the alleged owners of the relevant works of authorship are parties to the action. Similarly, the evidence is primarily in electronic form and can be just as readily accessed in either New York or Seattle. With respect to ivi's alleged business, very little evidence is in New York. ivi's principal place of business is in Seattle and most of the evidence relating to the operation of its business is likewise in Seattle.

3. The convenience of the parties

The convenience of the parties weighs strongly in favor of transfer to Seattle. ivi is a very small company with only 12 full-time employees. Weaver Dec., at ¶ 9. It would be a substantial hardship to ivi to litigate in New York, literally at the opposite end of the country. With so few employees, the time associated with court events and trial in New York would pose a potentially large disruption to ivi's business. Weaver Dec., at ¶ 9. Although litigation is surely a disruption in Seattle as well, it would be far less so because of the proximity. The inconvenience upon Weaver individually is particularly large considering that he is named as an individual.

By contrast, the Plaintiffs would experience far less inconvenience by pursuing this action in Seattle. The Plaintiffs are large corporations with sizeable legal departments and are continuously involved in litigation across the country, including Seattle. Weaver Dec., at ¶ 11. Collectively, the Plaintiffs are used to litigation across the country and distant from their corporate headquarters. Even a cursory review of litigation filed within the past two years as reflected in the Pacer database shows a large number of federal lawsuits involving the Plaintiffs all across the country. *Id*. As such none of the Plaintiffs would experience any inconvenience of consequence as a result of the transfer.

4. The locus of operative facts

The locus of the operative facts is more in Seattle than in New York. In each city, ivi has an antenna to receive over-the-air television broadcasts. But ivi's principal place of business is in Seattle and the accused services of ivi therefore have a locus in Seattle.

5. The ability to compel attendance of unwilling witnesses

At this early stage, it appears unlikely that there will be any third party witnesses who are located in either New York or Seattle, and none have been identified who might be unwilling. As such, this factor is neutral.

6. The relative means of the parties

The plaintiffs individually are some of the largest companies in the nation, if not the world. Collectively, the have an enormous capability to pursue this action anywhere and there is surely no hardship on them if required to pursue this action in Seattle.

By contrast, ivi is a very small company and Weaver is an individual, sued in his individual capacity. Neither has significant resources, and without question the Plaintiffs have far greater means than the Defendants. Weaver Dec., at ¶ 11. Moreover, the Plaintiffs have the ability to aggregate their resources by dividing the litigation expenses across a large pool of plaintiffs. This collective ability thereby magnifies their already enormous individual resources and weighs heavily in favor of transfer.

7. Additional Seattle-based considerations

In addition to the Plaintiffs already named in this action, ivi has been accused of copyright infringement by an additional Seattle-based television broadcaster. Weaver Dec., at ¶ 12. This additional accusation relates to the transmission of signals originating in Seattle, and therefore any subsequent legal action related to those transmissions would be brought in Seattle. Consequently, a legal action is certain to proceed in Seattle in addition to New York even if this action is not transferred. Allowing two actions to proceed in this instance would not only be inefficient, but it would potentially lead to inconsistent results. The dispute raises novel questions regarding copyright statutory licensing and the interplay between the FCC and the Copyright Act. Though ivi will demonstrate that the available legal precedents support its right to continue to operate under the statutory license of the Copyright Act, the possibility that different courts could reach conflicting conclusions surely exists. Because of that possibility, this action should be transferred to Seattle where it can be consolidated with the earlier-filed action that is already pending.

8. Caseload considerations

A final consideration is the relative caseloads in the Southern District of New York and the Western District of Washington. This Court has recognized that "in considering trial efficiency, a district court may also pay some mind to relative levels of docket congestion in the prospective transferor and transferee districts." *In re Connetics Sec. Litig.*, 2007 U.S.Dist.LEXIS 38480 (May 23, 2007); *see also Litton v. Avomex Inc.*, 2010 U.S.Dist.LEXIS 2881 (January 14, 2010). Although the Court can take judicial notice of the relative caseloads, attached to the declaration of Todd Weaver are reports on each jurisdiction as published in the Federal Court Management Statistics at www.uscourts.gov. The most recent data available from 2009 indicates that civil actions in the Southern District of New York have an average pendency of 31.4 months from filing to trial, while such cases in the Western District of Washington have a pendency of 19.0 months from filing to trial. Similarly, in this district there is an average of 937 pending cases per judgeship, while in the Western District of Washington there are 377 pending cases per judgeship. Undoubtedly this action can achieve a speedier resolution if transferred to the Western District of Washington, and this additional factor demonstrates that such a transfer is in the interest of justice.

III. WEAVER SHOULD BE DISMISSED

Though this action could have been brought in Seattle, it cannot be maintained in this forum. In the event the action is not transferred, Weaver should be dismissed for lack of personal jurisdiction in New York.

In response to a motion under Rule 12(b)(2) to dismiss for lack of personal jurisdiction, the Plaintiffs bear the burden of establishing that the Court has jurisdiction over the Defendant. *DiStefano v. Carozzi N. Am., Inc.*, 286 f.3d 81, 84 (2d Cir. 2001). At this stage, without an evidentiary hearing, the Plaintiffs must make a prima facie showing through pleadings and affidavits that jurisdiction exists. *CutCo Indus., Inc. v. Naughton*, 806 F.2d 361, 365 (2d Cir. 1986). Jurisdiction over Weaver is determined through the New York long-arm statute. *Bensusan Rest. Corp. v. King*, 126 F.3d 25, 27 (2d Cir. 1997).

On its face, the complaint makes no mention of any contacts between Weaver and New York. It does not allege that Weaver has done business in the state, nor that he has personally committed a tortious act within the state. The most that is alleged is that, "on information and belief," Weaver is the founder and CEO of ivi and is personally responsible for the operation of the ivi service. Complaint at ¶ 40. The complaint admits that Weaver is a resident of Seattle. *Id.* In fact, Weaver lives in Seattle and has no connections with New York. He owns no real property in New York, has not traveled to New York in the past several years for either personal or business purposes, and has never set foot in New York with respect to any of the alleged conduct. Weaver Dec., at ¶ 8. Although ivi does make use of television programming broadcast over-the-air in New York, any role of Weaver is strictly in his capacity as an officer of ivi. Indeed, the complaint does not allege otherwise.

As this Court has previously held, a general allegation that an officer controls a corporation is not sufficient to establish personal jurisdiction. *Arma v. Buyseasons, Inc.*, 591 F. Supp. 2d 637, 647 (S.D.N.Y. 2008). Courts in this district have "routinely granted 12(b)(2) motions for lack of personal jurisdiction where the plaintiff made only broadly worded and vague allegations about a defendant's participation in the matter at hand. *Karabu Corp. v. Gitner*, 16 F.supp.2d 319, 324 (S.D.N.Y. 1998). The Plaintiffs have alleged even less in this case. Other than alleging that Weaver is "personally responsible" for ivi's conduct, the complaint offers no specific allegations regarding Weaver's alleged role, his conduct, the manner in which he allegedly controlled ivi, or any other facts that might remotely relate to personal jurisdiction. Without such specific factual allegations, Weaver must be dismissed.

IV. CONCLUSION

Pursuant to 28 U.S.C. § 1404, and in the interests of justice, this action should be transferred to the United States District Court for the Western District of Washington at Seattle. In the event it is not transferred, Weaver should be dismissed for lack of personal jurisdiction.

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Seattle, Washington

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